

ORIGINAL

BEFORE THE

Federal Communications Commission

In re Applications of WASHINGTON, D.C. 20554 MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, California

RECEIVED

TO: The Honorable Edward Luton
Administrative Law Judge

MAY 14 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MOTION TO STRIKE

Gary E. Willson (Willson) moves to strike the declaration of Elliott Kline attached to the "Reply of Moonbeam, Inc. in Support of its Motion to Enlarge" as well as all references to that declaration in its Reply. The declaration should be struck on the grounds that use of the declaration in its reply violates Rule 1.45, is hearsay, and consideration of the declaration without opportunity to respond is fundamentally unfair to Willson.

In an effort to try to create a "conflict," Moonbeam has submitted for the first time the declaration of its engineer, Elliott Kline. Mr. Kline, in essence, asserts that Mr. Pringle, the site manager of Willson's proposed site, told Mr. Kline that he never gave reasonable assurance of the availability of Willson's site. This is based on an alleged phone conversation between Mr. Kline and Mr. Pringle in March 1992. This evidence is presented for the first time in Moonbeam's Reply, despite the fact that Mr. Pringle has always been the person identified as providing reasonable assurance to Mr. Willson and that any alleged conversation with Mr. Pringle indicating otherwise should

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have been presented in Moonbeam's initial Motion to Enlarge Issues. This is especially true since Mr. Elliott has been Moonbeam's engineer from the beginning and the alleged conversation with Mr. Pringle was known by Moonbeam or its agent when it filed its Motion. It is fundamentally unfair to raise a new matter in reply which should have been included in the Motion. This appears to be nothing more than a belated attempt to "parry with an offer of more evidence." Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941).


Finally, Willson notes that the declaration is rank hearsay with respect to information allegedly provided by Mr. Pringle. Willson has provided the declaration of Len Pringle, the site manager, unequivocally confirming the site's availability both now and at the time the Willson application was filed.¹ Mr. Willson also provided a letter from the site owner indicating that Mr. Pringle is authorized to act for his agent. Moonbeam's attempt to create a "conflict" with a hearsay declaration, which should have been presented earlier but was not denying Willson an opportunity to respond, should be rejected.

Respectfully submitted,

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GARY E. WILLSON

By


A. Wray Fitch III
His Attorney

May 14, 1993

[0068/C93awfMotStrk]

¹ It is also worth noting that since Moonbeam's Petition seeks an issue to determine whether Willson's site is currently available, Elliott Kline's hearsay declaration of a conversation occurring over one year ago in no way undermines the recently confirmed present availability of Willson's site and is irrelevant.

CERTIFICATE OF SERVICE

I, George Culver, in the law offices of Gammon & Grange, hereby certify that I have sent, this 14th day of May 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing MOTION TO STRIKE to the following:

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